(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

1/Civil 31450
Sup. Ct. No. 619-513

DIVISION FOUR

In re the Marriage of
Mary and William Hozie

Mary Hozie,
Respondent,

vs.

William Hozie,
Appellant.

[Filed August 3, 1973]

OPINION

Respondent husband appeals from certain portions of the San Francisco Superior Court's interlocutory Judgment of dissolution.

Questions Presented

1. Award of spousal support is not unconstitutional.
2. The findings are sufficient to support the award of spousal support, counsel fees and court costs.

3. The evidence supports that award.

4. Error in awarding wife alleged value of the furniture.

Record

Wife filed a petition for dissolution of the marriage to husband and asked the Court to divide certain real and personal property and to award her support, attorney fees and costs. Husband answered denying that there was any community property and asking that wife not be awarded support, attorney fees or costs. The parties were married June 10, 1967, and separated on May 20, 1969. There are no children of the marriage.

After a trial the Court filed findings of fact and conclusions of law and an interlocutory judgment of dissolution of marriage. In addition to granting disolution of marriage the Court awarded wife one half of the net proceeds of sale of the home in Mill Valley which was held in joint tenancy, an automobile, and ordered husband to pay wife $350 per month for spousal support for a two-year period, $1,500 attorney fees and the Court costs. Husband was awarded the furniture, subject to his paying wife the sum of $2,371. The Court found that all other property was the husband's separate property.[1]

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[1]Curiously enough, the judgment, which is on a printed form, makes no awards itself, but states that findings of fact and conclusions of law are attached to the judgment. However, the parties consider the findings and conclusions as part of the judgment and as ordering the disposition of the property and awards as set forth therein. We so treat it.

Husband appeals only from the following portions of the judgment: (1) the award to wife of spousal support; (2) the award to her of counsel fees and Court costs; (3) the requirement that husband pay wife $2,371 for furniture.

1. *Award of spousal support is not unconstitutional.*

Husband points out that under section 4801 of the Civil Code, it is no longer necessary for the Court to find a spouse guilty of fault in the marriage to require such spouse to pay spousal support to the other party.[2] Husband contends that awarding support to one party without a finding of fault on the part of the party to pay such support constitutes punishment without any legal reason, and is thus violative of the Fourteenth Amendment.

It is true that under the California Family Law Act (Civ. Code, § 4000 et seq.) it is no longer necessary for the party seeking permanent support to prove grounds so that a judgment can be granted against the other party as was the situation under former Civil Code section 139. However, even under former section 139, a party against whom a judgment had been granted could still be entitled to an award

[2]Civil Code section 4801 states in relevant part: "(a) In any judgment decreeing the dissolution of a marriage . . . the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment . . ."

of permanent support, if the Court used the device of awarding each party a divorce. *(De Burgh v. De Burgh* (1952) 39 Cal. 2d 858, 874.) Furthermore, under former section 139 it was held that support should not be awarded as a penalty for the *degree* of fault giving rise to the grounds for divorce. (*Cardew v. Cardew* (1961) 192 Cal. App. 2d 502, 509.)

It is clear that the state has a vital interest in the institution of marriage and under its plenary power it may fix the conditions under which the marital status may be created or terminated. *(In re Marriage of Walton* (1972) 28 Cal. App. 3d 108, 113.) *Walton* held that it was constitutional to change the ground for divorce from a fault standard to a marital breakdown standard. *(Id.,* p. 114.) Thus, since it has already been held constitutional for the state to provide that a dissolution of a marriage shall not be based on fault, the state may provide for the award of spousal support taking into consideration the circumstances of the respective parties. *(In re Marriage of Siegel* (1972) 26 Cal.App. 3d 88, 92.)

2. *Findings are sufficient to support the award.*

Civil Code section 4512 states that in actions for dissolution of marriage "the Court must file its decision and conclusions of law as in other cases." Husband requested findings.

He argues that it was error for the trial Court not to make a finding in regard to spousal support. In the trial Court's conclusions of law it is stated: "2. That petitioner is entitled to receive from respondent

the amount of $350 each month for her support commencing on July 1, 1971, and continuing up to and including July 1, 1973." A finding of fact can be treated as such though it is mistakenly placed among the conclusions of law. *(Estate of Woods* (1937) 23 Cal.App. 2d 187, 190.)

The case of *Jones v. Jones* (1955) 135 Cal.App 2d 52, 63, is dispositive of the issue whether the finding of alimony is sufficient in the instant case. In *Jones* the Court stated, "Appellant next attacks the finding 'That defendent should pay to plaintiff as and for her support and maintenance and alimony the sum of One Hundred Seventy Five Dollars ($175.) per month.' as being insufficient because the Court did not find the husband's ability to pay or the wife's needs. The finding is sufficent. While it is true that the court must make findings on all material issues in a divorce case as in other cases, and that the determination of alimony is a question of fact, the trial Court is only required to find ultimate facts and is not required to find probative facts. . . . The circumstances of the parties—i.e., the husband's ability to pay and the wife's needs—are merely probative of the ultimate fact of alimony."

Thus, the trial Court did in fact make a sufficient finding in regard to alimony and the same reasoning would apply to attorneys' fees and costs.

3. *The evidence supports the award.*

Husband argues that even if the trial Court did make a finding concerning spousal support, counsel

fees and Court Costs, there is not sufficient evidence in the record to support such a finding. Husband contends that, since the record is void of any evidence to support such a finding, the trial Court abused its discretion in awarding $350 a month spousal support to wife. When a party attacks an award of spousal support as an abuse of discretion, the evidence must be viewed most favorably in support of the award and the award will constitute an abuse of discretion only if it is concluded that "no judge reasonably could have made such an order." *(In re Marriage of Siegel, supra,* 26 Cal.App. 3d 88, 90.)

As before stated, the authority to award spousal support is conferred by Civil Code section 4801, which provides: ". . . the Court may order a party to pay for the support of the other party any amount . . . as the Court may deem just and reasonable having regard for the circumstances of the respective parties . . ." The general rule is stated in *Hall v. Hall* (1954) 42 Cal.2d 435, 442, as follows: "The principles which the trial judge must apply in awarding alimony are few and necessarily general in nature. An allowance for support must be made 'having regard for the circumstances of the respective parties.' (Civ. Code, § 139.) In making that award the trial Court has a wide discretion. [Citation.] 'Circumstances' [include] 'practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties.' [Citation.] '[I]t refers to the needs of the parties and the abilities of the parties to meet such needs; and in measuring such

circumstances, consideration should be given to property owned and obligations to be met as well as to ability to earn and actual earnings.' [Citation.]"

There is no showing in the case at bar that the trial Court abused its discretion in awarding wife spousal support in the amount of $350 a month for a two-year period. The evidence does indicate that wife is employed on a part time basis, but it further indicates that wife did not have enough money to meet all of her obligations and there is ample evidence in the transcript to indicate that husband has the ability to pay the award of spousal support.

4. *The furniture.*

The Court found that "The furniture and furnishings in the home in Mill Valley is community property." There is substantial evidence to support that finding. In his memo of intended decision, the judge stated: "Furniture to Respondent,—Value of same $2371.00 to wife." In the findings the Court stated. "The furniture and furnishings shall be given to respondent, but respondent shall pay to petitioner the sum of $2,371." There is no evidence in the record concerning the value of the furniture, nor can it be determined whether the value of $2,371 mentioned was intended to express the value of the community interest in the furniture or only the value of one half thereof. The wife would be entitled to only one half of the furniture's value.

At oral argument we asked counsel to explain, if they could, how the Court arrived at this figure or

to agree as to the furniture's proper value. We have been advised that they cannot agree nor to find any logical basis upon which the Court made its valuation.

Except as to this matter of valuation of the furniture the judgment is affirmed. The cause is remanded to the trial Court to determine the furniture's valuation and the amount husband is to pay wife because of the award of the furniture to him.

Respondent will recover costs.

We concur:

Devine, P. J.

Good, J.**

Bray, J.*

*Retired Presiding Justice of the Court of Appeal sitting under appointment by the Chairman of the Judicial Council.

**Retired judge of the superior court sitting under appointment by the Chairman of the Judicial Council.